Supreme Court, U.S.
FILED

D

03 681 SEP 19 2003

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

David Rothman (Petitioner-Pro se)

Vs.

Deputy Attorney General Clarke, Board of Trustees of William Paterson University, President Speert and Provost Sesay (Respondents)

ON PETITION FOR WRIT OF CERTIORARI
From the New Jersey Court of Appeals

David Rothman
785 Nebraska Ave.
Toms River, NJ 08753
732-288-9633

40 pp

QUESTIONS PRESENTED

This case arises from court decisions made in New Jersey about the protection afforded colleges by the Family Educational Right to Privacy Act (FERPA). Petitioner brought suit against William Paterson University for violations of the New Jersey Open Public Meetings Act and the courts ruled that FERPA inoculates them from a civil suit.

That decision will have a profound effect on how colleges will report crime statistics under the Clery Act. It will give college officials unbridled power to extend the meaning of what is an "education" record beyond the scope of what Congress intended when it passed FERPA. Congress made a clear distinction between what is an "education record" and what is a "law enforcement record" and Petitioner asks the Court to validate that distinction.

1) Can a federal statute, The Family Educational Right To Privacy Act 20 USC S. 1232(g) (also known as FERPA) be used as a defense for violations of a New Jersey Statute, 10:4-6 et seq. (The New Jersey Open Publics Meeting Act)?

2) Isn't the New Jersey Appellate Court ruling in Rothman v. Clarke, et al. (A-254-02T) in direct conflict with the Ohio Supreme Court ruling in *The Miami Student v. Miami University* 680 N.E. 2d. 956 in regards to the definition of what is an "education" record protected by FERPA?

3) Wouldn't the failure of a college to do an investigation into alleged criminal activity for fear of a lawsuit be in direct conflict with the Supreme Court's ruling in *Gonzaga v. Doe* 536 US 278 (2002) FERPA?

LIST OF PARTIES

Petitioner:
David Rothman (Pro-Se)

Respondents:
Deputy Attorney General Clarke, New Jersey
The Board of Trustees of William Paterson University
President Speert of William Paterson University
Provost Sesay of William Paterson University

TABLE OF CONTENTS

		Page #
Questions Presented		i
Parties to the Proceeding		ii
Table of Authorities Cited		iii
Statutes and Rules		iv
Opinions Below		1
Jurisdiction		1
Constitutional and Statutory Provisions		1
Statement of the Case		2-14
Reasons for Granting the Writ		15-16
Conclusion		16
Certification of Service		
Appendix		
Appendix 1 - Decision of the New Jersey Supreme Court, July 1, 2003	(App. 1)	1
Appendix 2 - Decision of New Jersey Appellate Court, April 8, 2003	(App. 2)	2-6
Appendix 3 - Decision of the Passaic County Superior Court, August 8, 2002	(App. 3)	7-13
Appendix 4- Department of Education Letter William Paterson University Oct. 14, 2003	(App. 4)	14-16

TABLE OF AUTHORITIES CITED

	Page #
Bauer v. Kincaid 759 F. Supp. 575 (W.D.Mo. 1991)	9
California v. Sierra Club 351 U.S. 287 (1981)	11
Crispin v. Volkswagenwerk A.G. 96 NJ 336 (1984)	13
Duke Power v. Carolina Environmental Study Group 438 US 59 (1978)	11
Gonzaga v. Doe (01-679) 536 U.S 278 (2002)	i,11
Priebe & Sons v. United States 332 US 407 (1947)	13
Red & Black Pub. Comp. Inc. v. Bd. of Regents 427 S.E. 2d 257 (1994)	9
The Miami Student v. Miami Univ. 680 N.E. 2d. 956 (1997)	i,7
United States v. Miami University (C2-98-0297)	.9

STATUTES AND RULES

28 USC 1254(1)	1
28 USC 1257(a)	1
20 USC 1232(g) (FERPA)	1-2, 6-16
20 USC 1232(g)(1)(A)	8
20 USC 1232(g)(2)(B)ii	8

	Page #
20 USC 1232(f) (Clery Act)	9, 12, 15
20 USC 1232 (f)(e)(6((4)(A)	12, 13
Higher Education Amendments of 1992	9
34 CFR 99.61	11,12
N. J. Civil Rights Statute (10:4-6 et seq)	1-7, 2-16
10:4-7	4-5
10:4-9	5
10:4-11	5
10:4-12	4-5
10:4-13	3-5
10:4-15	5
10:4-16	6
10:4-17	6
OTHER	
Declaration of Independence, 1776	4
James Madison Letter to W. T. Barry, Aug. 4, 1822	13-14

OPINONS BELOW

The opinion of the highest state court to review the merits appears at Appendix 1.

The New Jersey Court of Appeals opinion is not yet published and is reprinted in Appendix 2.

The Superior Court opinion is not published and is reprinted in Appendix 3.

JURISDICTION

The New Jersey Supreme Court denied review of petition for certification on July 1, Petitioner applies to the United States Supreme Court under 28 USC 1254 (1) and under 28 USC 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Family Educational Right to Privacy Act, Section 1232(g) of Title 20 of theUnited States Code

The Code of Federal Laws, Regulation 99 of Section 34

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, Section 1232(f) of Title 20 of the United States Code

Buckley Amendment of 1992

New Jersey Civil Rights Statute of the Open Public Meetings Act, 10:4-6 et seq.

STATEMENT OF THE CASE

The Superior Court, the Appellate Court, and now the New Jersey Supreme Court of New Jersey have allowed the application of The Family Educational Right to Privacy Act 20 USC 1232 (g) (also referred to as FERPA) to be used as a defense in a case for violations of a New Jersey Civil Rights Statute regarding The Open Public Meetings Act.

Petitioner had filed a complaint in the Superior Court of Passaic County because his Civil Rights were violated under New Jersey Statute 10:4-6 et seq. The action was brought against William Paterson University Board of Trustees, President Speert, Provost Sesay, and Deputy Attorney General Clarke. The Superior Court Judge and now the Appellate Court have misinterpreted the use of the FERPA by applying it to this case. The New Jersey Supreme Court denied petitioner certification. I believe defendants reliance on this law and the Courts interpretation, is without merit and flawed.

Petitioner had complained to University officials that certain members of a fraternity had done illegal fundraising on their campus. Petitioner asked for an investigation by the University. The request followed the tragic loss of the petitioner's son on March 14, 2001.

Petitioner and his wife set up the Jeffrey Rothman Memorial Scholarship Fund to honor their son and to give out scholarships to seniors at Toms River East High School. The Zeta Beta Tau fraternity, of which Jeff was a member, ran a few days of fundraising on the campus of William Paterson University. However, three members of the fraternity collected the money in late March of 2001 and never turned it over to the ScholarshipFund.

Three months later, the Scholarship Fund filed a civil suit in Passaic County Superior Court. A settlement was reached after the three students admitted to violating the New Jersey Charities and Registration Act.

Petitioner attended a Board of Trustees Meeting of William Paterson in of March 2, 2002. It was almost one year to the day his son died. About 100 people witnessed it. Plaintiff spoke about the tragedy he and his wife suffered and about how they set up the Jeffrey Rothman Memorial Scholarship Fund to honor their son.

The money donated by many college students, faculty, and workers was given with the belief that this money was going to the Jeffrey Rothman Memorial Scholarship Fund. Petitioner wanted to know what action the University had taken into allegations of wrongdoing by the three students in this case. The University had been advised many times of accusations of inappropriate behavior by these three fraternity brothers. They were advised many times via e-mails, letters and by personal appeal in a meeting with Provost Sesay. Campus police were also notified that three members of the ZBT fraternity had done illegal fundraising on their campus. No one took any action.

As soon as Petitioner was done speaking on 3/2/02, the Board stated that they reviewed petitioner's complaint in private and prior to the open public part of the meeting. This act alone violated the New Jersey Open Public Meeting's Act 10:4-13 in which "No public body shall exclude from any meeting to discuss any matter described in subsection 7.b until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted: (a) Stating the general nature of the subject to be discusses and (b) stating as precisely as possible, the time when and the circumstances

under which the discussion conducted in closed session of the public body can be disclosed to the public." Defendants failed to follow this rule of proper procedure.

The University based their decision on what they called "an extensive investigation by Deputy Attorney General Cheryl Clarke." and that no further action would be taken in this case. They indicated the case was closed and that there was no more discussion on this subject.

The decision not to take any action was decided before the petitioner spoke and done prior to the open public part of the meeting. However, the public policy of the State of New Jersey is to maximize participation in such matters and it is the Legislature's desire that "the right of the people to be present at meetings of all public bodies, and to witness in full detail all phases of the deliberation…is vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government and the publics effectiveness in fulfilling its role in a democratic society." This is the embodiment of New Jersey Statute 10:4-7.

Petitioner along with many other people were outraged that a decision could be made prior to his speaking and was even more shocked to find out that there was never an investigation by the Deputy Attorney General. Nor was there ever an investigation by University officials. Petitioner then filed suit in violation of New Jersey's Open Public Meetings Act. "Governments derive their just powers from the consent of the governed." The Declaration of Independence, 1776.

Petitioner filed a complaint in Passaic County Superior Court. A hearing was held in front of Judge Donato on August 6, 2002. The complaint for violations of the New Jersey Open Public Meeting's Act was filed against Deputy Attorney General Clarke, The Board of Trustees, President Speert, and Provost Sesay for the following reasons:

Defendants violated sections of the Open Public Meetings Act:
10:4-7- "Secrecy in public affairs undermines the faith of the public in government." " It is the public policy that the aforesaid rights are implemented."

10:4-9- "No public body shall hold a meeting unless adequate notice thereof has been provided to the public."

10:4-11-"Failure to invite portion of members to a meeting for the purpose of circumventing this act."

10:4-12-"Nothing…shall be construed to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting."

10:4-13-"No body shall exclude the public…until the public body shall first adopt a resolution…stating the general nature, and stating…the time when and the circumstances under which discussion conducted in closed session of the public body can be disclosed to the public."

Petitioner sought relief under the following:
10:4-15-"any action taken at a public meeting which does not conform with the provisions of a proceeding of this Act, shall be voidable in a proceeding of prerogative writ in the Superior Court." "any party, including any member of the public, may institute a proceeding in lieu of prerogative writ in the Superior Court…"

10:4-16-"that an injunctive order or other remedies should have been issued by the Superior Court for failure to comply with the provisions of the Open Public Meetings Act" and that penalties can also be enforced under 10:4-17,

The New Jersey Legislature was clear in its intent to protect the democratic process. The University violated that by making a decision behind closed doors with no witnesses, no investigation and in total disregard for petitioner's Civil Rights under New Jersey Statute 10:4-6 et seq.

Superior Court Judge Donato, I believe, incorrectly sided with defendant's argument that somehow allowed the Family Educational Right to Privacy Act to be used as a defense to dismiss a complaint for violation of New Jersey's Open Public Meetings Act. The Judge reasoned "With respect to this case, a public body may exclude the public only from that portion of a meeting at which the public body discusses, one, any matter which by express provision, federal law should not be rendered-should-shall be rendered confidential or excluded from the provisions oft the state statute. And, two, any matter in which the release of such information would impair the right to receive funds from the Federal Government of the United States pursuant to the Family Educational Right to Privacy Act."

His decision failed to address the original complaint, which was filed for violations of the Open Public Meetings Act. I feel his statements are incorrect. FERPA has no legal application in this case. There is no mention, no citing, and no reference in the Family Educational Right to Privacy Act, which should have prevented petitioner from having his suit for violations of The New Jersey Open Public Meetings Act heard in a trial court.

I, also, believe that the Appellate Court erred in its decision. The Appellate Court states that "We think it plain that federal law mandated the closed door session." I believe, they are misinterpreting the application of a Federal Law (FERPA) to a New Jersey Statute (Open Public Meetings Act.)

They go on to say that "FERPA prohibits release of student records, including all institutional information relating to the student, by precluding federal funding to an institution which permits such release. The federal policy protecting the privacy and confidentiality of matters relating to student information clearly embraces disciplinary or proposed disciplinary action against the students"

This ruling is in direct conflict with the Ohio Supreme Court ruling in *The Miami Student v. Miami University,* N. E. 2d 956 "that student disciplinary records relating to criminal behavior maintained by a public college were not "education records."

I feel this represents a misuse of The Family Educational Right to Privacy Act in a case where it does not belong. The statement by the New Jersey Appellate Court should have no legal application in this case. How can a Court say what records are student records when there are no student records that were ever asked to be seen in this case? FERPA does not belong as a defense for violation of a New Jersey Open Public Meetings Act. The two are antithetical.

In addition, if William Paterson officials wanted to invoke FERPA they should have at least done a disciplinary review to gather the facts. Then they may have had a better argument. But to do nothing, then try to justify it under the FERPA is inexcusable. Disciplinary records can't be

protected if there are no records to protect. The school did no investigation; thus no records exist and FERPA becomes moot in this case.

Petitioner has no understanding as to why the FERPA was ever applied in a case for violations of a New Jersey Statute. However, if we were to follow the reasoning of the New Jersey courts, then FERPA could be imposed as a defense for any complaints that a university did not want to investigate. This was not the legislature's intent for FERPA.

If a crime is committed on a college campus, university officials have every right and obligation to investigate it. Crimes are committed on college campuses and schools do investigations. That's how we insure that the college campus is a safe haven for students.

FERPA itself clearly states in (1)(A) that "No funds shall be made available under any program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of a student…as the case may be the right to inspect and review education records of their children." The law was passed so that universities do not block access to students and parents of their own educational records.

They are clearly specific in what they referred in the "educational records." Educational records do not mean those records involving illegal behavior.

Obvious exceptions in FERPA (2)(B)ii, are that education records as defined do not mean "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement agency for the purpose

of law enforcement" It decided so in *United States v. Miami University* C-2-98-0287 when it declared that law enforcement records are not "education records" and receive no protection by the FERPA." In *Red Publishing Co., Inc. Bd. of Regents* 427 S.E. 2d 257, the Court defined the meaning of education records and were specific to leave out law enforcement records and stated that educational records are "those relating to individual student academic performance, financial aid, or scholastic probation."

In *Bauer v. Kincaid* 759 F. Supp, 575, the Missouri Courts that "criminal investigation and incident reports compiled and maintained by the Southwest Missouri State University Safety and Security Department would likely fall within the current law enforcement records exception. In fact, the subsequent amendments to the FERPA and its regulations were likely designed to bring the Bauer documents clearly within the law enforcement unit records exception."

The FERPA law cannot logically be used to block an investigation into criminal activity on campus. Federal funding to a university has absolutely nothing to do with university officials ability to investigate potential criminal activities. FERPA in no way limits investigation of criminal behavior and it makes that distinction obvious. The reasoning behind the university's failure to do an investigation and to use the FERPA as a defense makes no sense. It is the applicability of a Federal law in a case where it doesn't belong.

The Higher Education Amendments (1992) to the Family Educational Right to Privacy Act specifically provided that campus law enforcement records are not afforded the confidentiality of education records. This prohibits campus administrators from invoking the Family Education Rights

and Privacy Act to shield information about allegations of criminal behavior on their campus.

The law was clear on this matter. University officials cannot use FERPA as a way to hide the reporting of criminal activity on their campus. This is in direct violations of the Clery Act which requires colleges to record every crime that is reported to them.

In this case, petitioner never asked to see any records of any students, nor did petitioner ever ask to discuss individual students in public session. That would make The Family Educational Right to Privacy Act, totally inapplicable. Plaintiff only asked, initially, for an investigation into possible illegal activity on the part of certain students.

The university refuses to discuss what steps it took to make this investigation. They cite FERPA, but in my view, this is reading of a federal statute, which is not merited under the facts of this case.

The university lied about the investigation and then tried to hide behind the Family Educational Right to Privacy Act. There has never been any paperwork ever turned over to petitioner that any investigation ever took place by William Paterson officials or Deputy Attorney General Clarke.

William Paterson officials may have stonewalled petitioner because of the fear of being sued by one of the alleged violators. However, these fears are groundless. The United States Supreme Court has heard one case about a student suing a University under FERPA; *Gonzaga University v. Doe* 536 U.S. 278. That decision states that the FERPA can not be used by individuals to sue universities. It held that the scope of this act did not reach that far.

The "court has never held, and declines to do so here, that spending legislation drafted in terms resembling FERPA'S can confer enforceable rights" and "There is no question that FERPA'S confidentiality provisions create no personable rights enforceable under S. 983."*Gonazga, Id.*

The decision also goes on to say that "The Court further stated the "mechanism that Congress chose to provide for forcing these provisions" further precludes any individual right to action. Schools can only lose funding if they display repeated failures in protecting private records. Since a School cannot lose funds for one violation, an individual should not gain the right to sue…" *Gonzaga, Id.*

"The provisions lack the support of individually focused rights, creating language that is critical. FERPA'S provisions speak only to the Secretary of Education. FERPA'S nondisclosure provisions speak only in terms of institutional policy and practice, not individual instances of disclosures." *Gonzaga, Id.*

The Supreme Court went so far in *California v. Sierra Club* 351 U. S. 287 when it said "that unless Congress intended to create new individual rights, there is no basis for a private suit" and in *Duke Power v. Carolina Environmental Study Group* 438 US 59, it stated "that the accommodation amongst interests which the Legislative branch has struck may have profound and far reaching consequences…, provides all the more reason for this court to defer to the Congressional judgement unless it is demonstrably arbitrary or irrational."

Criminal conduct cannot win out; the rights of victims must be protected. How do William Paterson University officials explain that they made a decision based on an investigation, but then turn around and say there never was an investigation? Which is it?

This university owed an investigation to all those students, teachers, and campus workers that donated money, thinking it was going to the Jeffrey Rothman Memorial Scholarship Fund. They were victims too! How were their rights protected?

If William Paterson University Officials had any concern about the use of FERPA being in conflict with a New Jersey Statute they could have contacted the Department of Education based on 34 CFR 99.61 which states "when an educational agency or institution believes that it cannot comply with FERPA due to a potential conflict with state laws, it must notify DOE" William Paterson University did not do this.

A public university is given powers by the people. In order to maintain public trust, they must avoid any abuse of those powers. Universities are not reporting all of the criminal activity that is occurring on their campuses. They are guilty of using loopholes in reporting and investigating crime statistics; resulting in inaccurate crime reports and allowing students to go unprotected.

This issue was addressed in The Higher Education Amendment Act of 1998. Its official name is Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act or the Clery Act (20 UCS 1232(f)).

In 20 USC 1232 (f) Section 485 (e)(6)(4)(A), "Each institution participating in any program under this title that maintains a police or security department of any kind shall make, keep, and maintain a daily log written in a form that can be easily understood, recording all crimes reported to the police or security department." The university failed to do this.

Petitioner was claiming his civil rights were violated, because there were violations of the Open Public Meeting's Act. How can any court apply the Family Educational Right to Privacy Act here, when it has no place in this case? "...answers are not obtained by pursuing the wrong question and thereby begging the real one" *Priebe & Sons v. United States* 332 U. S. 407

There is absolutely no logical or legal reason for the FERPA act to be imposed in this case. The real question the New Jersey Courts should have been deciding was "Did the University deny Plaintiff his Civil Rights under New Jersey Statute 10:4-6 et seq.? And to answer that question, a trial is required.

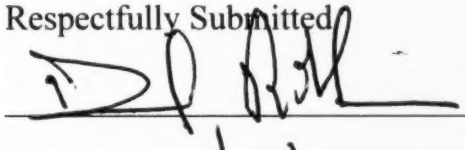
The violations of the New Jersey Open Public Meetings Act should have been dealt with as an entirely different issue. The defendants avoided, muddled and diverted all this by invoking The Family Educational Right to Privacy Act to a case in which it does not belong. They floated a "red herring" of great proportions and may get away with it, instead "the paramount policies of our law require that...the plaintiff be afforded an opportunity to have the claim adjudicated on the merits..." *Crispin v. Volkswagernwerk* A. G. 96 NJ 336

Petitioner asks that justice be done and notes that a "popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own government must arm themselves with the power which knowledge gives." James Madison.

Petitioner prays to the Court for the principles of law to prevail and that we maintain the preservation of the public's rights to an open and honest government. 10:4-6 et seq. affords us that right. Petitioner prays that this Court finds "…that secrecy in public affairs undermines the faith of the public in government and the publics effectiveness in fulfilling its role in a democratic society."

This is the law and we need to be protected. Every voice must be heard. Yet all we hear is the silence coming from the walls of William Paterson University. The silence is deafening. The New Jersey Attorney General's office protects that silence. Who will protect our rights and more importantly who will protect the rights of our children? We must break down those walls and insure that all our voices are heard. .

Respectfully Submitted,



Dated 11/6/03

David Rothman, 785 Nebraska Ave. Toms River, NJ 08753-phone (732-288-9114)

REASONS FOR GRANTING THE PETITION

This case represents a serious issue of national public interest. Universities can not be given unbridled and arbitrary power to use the Family Educational Right to Privacy Act as a reason for not doing an investigation into illegal criminal activities on their campuses. "Law enforcement" records are not "education" records and the Court needs to be clear on this matter.

If we don't overturn the lower court decisions then we are setting a legal precedent that would have a wide-ranging effect on future cases and could be utilized by any university to circumvent all of the Higher Education Acts that Congress passed in recent years. These Acts were designed to protect students not to bypass the law.

A crime was committed on the campus of William Paterson University. A complaint was filed. The university said they did an investigation, but they did nothing. This was done at an Open Public Meeting by the Board of Trustees on March 2, 2002. The university was charged with violations of the New Jersey Civil Right Statute of the Open Public Meetings Act.

Yet somehow on the way to a trial, the defendants were able to impose the Family Educational Right to Privacy Act as a defense for covering up their misdeeds and for violations of a New Jersey Civil Rights Statute. The FERPA cannot be invoked in a case where a University failed to follow the rules of law as it regards the Open Public Meetings Act.

If the decision of the New Jersey Courts is allowed to stand, then we will be sending the wrong message to college students across this country. The Clery Act was enacted to insure that potential students have access to crime rates on the various campuses they are applying to. This is to insure that both students and parents can make an informed decision on what university they ultimately choose.

In addition, this Court will now have the opportunity to decide which ruling was correct: The New Jersey Appellate Court or the decision by the Ohio State Supreme Court in which each offers their understanding of what an "education record" and the protection is should be afforded.

We therefore cannot allow any university the capricious and arbitrary power to decide which crimes they may or may not report. This is in direct violation of the law. The United States Congress, surely, never intended to have a statute misused in such a way.

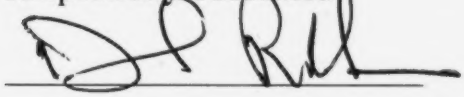
If we are to protect the rights of all of our students then we need to remand this case to trial and allow petitioner to continue his lawsuit against the William Paterson University Board of Trustees, President Speert, Provost Sesay, and Deputy Attorney Cheryl Clarke for violations of petitioner's Civil Rights under New Jersey Statute 10:4-6 et seq.

We, also, need to set the record straight and tell universities across this county that The Family Educational Right to Privacy Act cannot and will not be used to cover-up and circumvent the reporting of any criminal activity on their campus. Our society expects that their children will be protected and our laws demand that we protect those rights.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,



Date 11/6/03

IN THE SUPREME COURT OF THE UNITED STATES

David Rothman
(Petitioner)

Vs.

Deputy Attorney General Clarke, William Paterson Univ. Board of Trustees, President Speert, Provost Sesay
(Respondents)

CERTIFICATION OF SERVICE

I, David Rothman do swear or declare that on this date of Nov 6, 2003, as required by Supreme Court Rule 29, I have served the enclosed PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail, properly addressed to each of them and with first class postage.

The names and addresses of those served are as follows:

Cheryl Clarke
25 Market ST
Trenton, NJ 08625

I declare under penalty of perjury that the foregoing is true and correct,

Executed on Nov 6 2003

Signature

APPENDIX 1
NEW JERSEY SUPREME COURT

NO. 54,726

DAVID ROTHMAN, Plaintiff-Petitioner
v.
DEPUTY ATTORNEY GENERAL CHERYL CLARKE, BOARD OF TRUSTEES OF WILLIAM PATERSON UNIVERSITY, PRESIDENT SPEERT, PROVOST SESAY

Defendants-Respondents

To the Appellate Division, Superior Court:
A petition for certification of the judgment in A-354-02 having been submitted to this Court, and the Court having considered the same:
It is ordered that the petition for certification is denied, with costs.

Witness, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 1st day of July, 2003.

APPENDIX 2
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-354-02T5

DAVID ROTHMAN, Plaintiff-Appellant
v.
DEPUTY ATTORNEY GENERAL CHERYL CLARKE, BOARD OF TRUSTEES OF WILLIAM PATERSON UNIVERSITY, PRESIDENT SPEERT, PROVOST SESAY
Defendant-Respondents

Submitted April 8, 2003-Decided

Before Judges Pressler, Wallace, Jr. and Hoens

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, L-1509-02.

David Rothman, appellant pro-se.

Peter C. Harvey, Acting Attorney General, attorney for respondent (Patrick DeAlmeida, Deputy Attorney General, of Counsel; Melissa E. Hagar, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff David Rothman commenced this action against defendants Deputy Attorney General Cheryl Clarke, the Board of Trustees of William Paterson University, and the University's president and provost claiming violations of the Open Public Meetings Act, N.J.S.A. 10:4-6 to 10:4-21. He appeals from the dismissal of the complaint pursuant to R. 4:6-2(e) for failure to state a claim. We affirm substantially for the reasons stated by Judge Donato on the records of August 6, 2002.

We ad the following comments. We are mindful that a defense motion brought under that rule requires the complaint to be searched in depth and with liberality to determine if a cause of action can be gleamed even from an obscure statement and hence that every reasonable favorable inference is accorded the plaintiff. *Printing Mart v. Sharp Electronics*, 116, N. J. 739, 746 (1989). See also, *F. G. v. MacDonell*, 150 N. J. 550, 556 (1997); *Craig v. Suburban Cablevision*, 140 N. J. 623, 625-626 (1995); *Seidenberg v. Summit Bank*, 348 N. J. Super, 243, 250 (App. Div. 2002). We are satisfied, however, that no cognizable cause of action has been pleaded no matter how indulgently we read the complaint.

The relevant facts are not in dispute. Plaintiff's son, Jeffrey Rothman, died tragically on March 14, 2001. He was at the time a student at William Paterson University and a member of Zeta Beta Tau (ZBT) fraternity. The creation by his parents of a memorial scholarship fund in Jeffrey's name was announced at the funeral and several of the ZBT members, without consulting plaintiff or obtaining his permission, undertook activities to raise money for the fund. Plaintiff alleges that they did so over five days in late March, four days on campus and one day off campus. They did not,

however, immediately turn any money over to the scholarship fund, and plaintiff commenced an action against three of the fraternity brothers in the small claims division of the Special Civil Part on June 19, 2001. Plaintiff had also written to the Department of Consumer Affairs complaining of the fraternity's refusal to turn over to the memorial fund, the money it had collected. Several days after the filing of the Special Civil Part complaint, a settlement was reached whereby defendants acknowledged that they had collected $240, apologized to plaintiff, and donated the money to a charity designated by plaintiff, who did not, under the circumstances, want the sum to be part of the memorial fund. It remained, however, plaintiff's belief that a considerable larger amount had been collected.

Plaintiff then demanded an investigation by the University with appropriate action taken against the students involved and the establishment of guidelines for student fundraising. The Board of Trustees, advised by DAG Clarke, placed the matter on the agenda for its meeting of March 2, 2002. Plaintiff was notified of the date, appeared and addressed the Board in a speech whose text was annexed to the complaint. The Board, which expressed its condolences to the plaintiff on the loss of his son, stated that it had nevertheless determined, presumably in closed session, not to take disciplinary action against the students and regarded the matter as closed.

The gravamen of plaintiff's action is his claim that the Board's closed discussion and decision respecting the involvement of the ZBT students and its aftermath violated the Open Public Meetings Act and particularly N.J S.A. 10:4-12s, which requires all meeting to be open to the public at all times. N. J. S. A. 5:4-12a expressly excepts, however, discussions and deliberations held by a public body pursuant

to N.J.S.A. 10:4-12b. The first such exception provided for by 10:4-12b(1) is "any matter which, by express provision of Federal Law or State statute or rule of court shall be rendered confidential or excluded from the provisions of subsection a. of this section."

We think it plain that federal law mandated the closed session here. The Family Education Rights and Privacy Act (FERPA), 20 U.S.C.A. S 1232g(b), prohibits release of student records, including all institutional information relating to the student, by precluding federal funding to an institution which permits such release. The federal policy protecting the privacy and confidentiality of matters relating to student information clearly embraces disciplinary or proposed disciplinary action against students. We, are therefore, satisfied that the Board's refusal to discuss the situation of the individual students in public session was well justified by N.J.S.A. 10:4-12(b)(1) and hence no violation of the Open Public Meetings Act.

There are several other matters we must address. First, plaintiff demanded records and information from various governmental sources. We are satisfied by Judge Donato's opinion that plaintiff ultimately received all relevant information he requested and hence that any issue respecting release of information is now moot. We are also aware that upon conclusion of the plaintiff's speech at the March 2 meeting, a Board member stated that DAG Clarke had made an extensive investigation of the matter. When plaintiff demanded access to her investigation file, he was advised by the Board that the member had misspoken and that there had been no such investigation. There is nothing in this record suggesting the contrary.

In sum, while we appreciate plaintiff's understandably strong feelings about the matter and his evident sense of outrage that money collected in the name of his son's memorial was mishandled; we are constrained to conclude that the complaint, taking into account all of the exhibits annexed thereto, fails to state a cause of action against any of these defendants.

The order dismissing the complaint is affirmed.

APPENDIX 3
SUPERIOR COURT OF NEW JERSEY
PASSAIC COUNTY, CIVIL PART

DOCKET NO. L-001509-02

DAVID ROTHMAN, Plaintiff
v.
CHERYL CLARKE, et al., Defendants

Place: Passaic County Court
Paterson, New Jersey

Date: August 6, 2002

BEFORE:
THE HONORABLE FRANK M. DONATO, J.S.C.

INDEX

THE COURT: Decision

And my decision in this case, based on the reasons I'm about to give, is I am granting the State's—the—defendant's motion to dismiss this complaint. It does render the amend—the request to amend the complaint moot but it would—that—that request was withdrawn by Mr. Rothman. There's no need to deal with the request to compel documents for two reasons: Number one, the complaint is

being dismissed; and number two, all the information requested is being turned over to Mr. Rothman. And lastly, after reviewing the information that has been supplied to me in-camera, all the information that pertains to Mr. Rothman's situation is being turned over to Mr. Rothman. What is being excised and not turned over to Mr. Rothman is decisions in the minutes that have absolutely nothing to do with Mr. Rothman or his son. It's—it concerns the date over issued unrelated to this that happened to take place in the meeting.

In such a case the plaintiff is entitle to every favor inference at this point in the juncture in the litigation. In giving the plaintiff every favorable inference the basis of this case against Deputy Attorney General Clarke, Paterson—William Paterson University, its President, its Board of Trustees and its Provost stem from Mr. Rothman's position with respect to occurrences that occurred at the Board of Trustees Meeting held on March 2nd, 2002. The allegation is there is a violation of the Open Public Meetings Act. We did drift into the Freedom of Information Act, which is part of this case.

The basics of the case against Deputy Attorney Blair and the—section of the Department of Consumer Affairs deals with the document requests. I understand as I alluded to before that the plaintiff is pro se; has suffered a terrible tragedy in the loss of his son. And I have attempted as best I can to look with leniency on the pleadings and the arguments of the plaintiff. However, I did point out that sometimes I – slipped my mind that this was, in fact, a pro se litigant because of the very fine job that he was doing.

Assuming a cause of action based on – the facts and assuming all the documents and all the information have been supplied to or will be supplied to the plaintiff that is permitted under law. Jeffrey Rothman, who was the son of David Rothman, died on March 14th, 2001. Jeffrey was a member of the Zeta Beta Tau fraternity of William Paterson University. Within two weeks of losing their fraternity brother and the plaintiff's son, ZBT decided to raise money for a memorial fund that Jeffrey's family had set up, which they claim they learned about at the funeral. ZBT collected money a memorial service held on campus on March 27th, 2001. Mr. Rothman, the plaintiff in this matter, believed that ZBT, and still takes this position; collected a sum of money greater than what ZBT said it collected.

In June of 2001 Barry Rothman, on behalf of the Jeffrey Rothman memorial scholarship—scholarship fund, filed civil actions in the Small Claim Section of the Passaic County Court against Glenn Felson, Brian Russo, and Mike O'Hare. The suit claimed that $1,999 was collected over four days on campus and one day at Joey Harrisons in Clifton. Barry Rothman in June of 2001 wrote to the Department of Community Affairs alleging that ZBT held fund-raisers over a number of days at a nightclub and raised about $4,000. The supervisor of Community Affairs wrote to the president of ZBT requesting information regarding the alleged fund-raising and wrote back to Barry Rothman indicating that Consumer Affairs would look into the issue.

In July of 2001 Barry Rothman wrote to Miss Taggart, who was the supervisor of Community Affairs, recapping a conversation that he had had with her. The letter indicates that Consumer Affairs had looked into the concerns enumerated by Mr. Rothman's letter of June, 2001. Mr. Rothman acknowledged that ZBT wanted to send $240.00 to

the memorial fund that the memorial fund that such a sum was an insult to everyone involved and that he would not accept the $240.00 offer.

In July of 2001 a representative of ZBT wrote to Consumer Affairs explaining that ZBT had collected that $240.00: One at the student center and another at the memorial service through a bucket. People would drop money into a bucket.

In July of 2001 David Rothman wrote to the representative of the Consumer Affairs attaching a statement from a ZBT member, who reacted to finding out ZBT had not sent the money to the memorial fund. However, no mention of ZBT's attempts to send the money to the fund was mentioned.

In October of 2001 the three ZBT members sued in Small Claims Court and settled with the memorial fund. ZBT admitted that they—when they collected the money they did so without seeking permission form the memorial fund itself. The terms of the settlement were that the three ZBT members would apologize, pay $240.00 to the charity of Rothman's choosing within 30 days, and that members would admit that they did not turn the money over until three days after the Small Claims Suit was filed.

Both Barry and David Rothman at the hearing agreed to the terms of the settlement. The transcript reads:
"THE COURT: Okay.
"THE COURT: Mr. Rothman, both Mr. Rothmans, I understand dad and uncle are present. This is acceptable to you gentlemen?
"MR. ROTHMAN: Yes, it is.
"MR. PALFY: That's the way that he—that's all they wanted was an apology."

Soon thereafter David Rothman e-mailed the Office of Attorney General on November 13th alleging that action should be taken—an action should be taken against ZBT members for the illegal fund-raising activities. There was a response from Attorney General Marilyn Bair.

Mr. Rothman requested and was permitted to address the William Paterson Board of Trustees on March 2nd, 2001, almost a year after the death of his son. Again he requested that the college take action against ZBT. At the open session of the Board the University expressed its intention not to take any disciplinary action against the students. Apparently there was a statement made by someone that such a decision was made after an investigation by Deputy Attorney General assigned to give representation to William Paterson.

The next day Mr. Rothman wrote to the New Jersey Attorney General alleging that the Board had made up its mind no to take action against ZBT members before he spoke, which he alleges is a violation of the Open Public Meetings Act. David Rothman at that time requested all the files relating to the case held by—should—shall be rendered confidential or excluded from the provisions of the statute. And two, any matter in which the release of such information would impair a right to receive funds from the Federal government of the United States. Pursuant to the Family Education Rights and Privacy Act, the university shall not disclose matters involving students' educational records. The statute provided at section 1232(g)b: No funds should be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting identifiable information contained therein without the written consent of the students.

The expectation that the university could have discussion regarding a disciplinary action or potential disciplinary matters involving a student in open public session runs contrary to the Federal statute; namely, the Family Educational Right to Privacy Act. Within the bounds of this Act the university stated it intended actions in the open public session on March 2nd, 2002. Mr. Rothman acknowledged the university's decision not to take action. But I believe the university properly balanced its duties under the Open Public Meetings Act and the Family Educational Rights and Privacy Act.

With respect to the Freedom of Information Act, Mr. Rothman has requested documents from the Department of Community Affairs and they have been supplied to him. He has requested documents from William Paterson and they have been supplied to him. Since the documents were requested the various motions to compel them are moot.

There is no issue with respect to the adding--adding of Marilyn Blair as a party as that has been withdrawn.

Mr. Rothman in determining that he believed a hearing should have been conducted, although I believe that that would be contrary to Federal law, indicates that he should have been party to such—to such a discussion. And he cites the William Paterson University handbook. The provision cited by Mr. Rothman refers to the university hearing board, not to the Board of Trustees. The William Paterson student handbook says: the hearing conducted by the university hearing board will be closed- -and it says the university hearing board- -will be closed except to those directly involved.

I believe that takes care of all of the issues in the case with the exception of the in-camera review. I have reviewed

he documents in-camera of the closed session of the March 2nd, 2002 meeting of the Board of Trustees. There are some redacted portions of the minutes. They concern matters unrelated to the Rothman question. I don't even think it's necessary to go into them, but they have absolutely nothing to do- -were matters- -other matters that the Board took up at that meeting. But they were completely unrelated to Mr. Rothman's case. There are no redacted statements related to the Rothmans. In other words, the entirety of the minutes relating to the Rothman issue are going to be turned over to Mr. Rothman. The information that's been redacted concern portions of other matters that- - other confidential matters that the Board took up completely unrelated- - to the Rothman case, some of which concern students, other students, not related to Mr. Rothman, having nothing to do with this case.

So I am going to grant the request to turn over the documents, namely, the minutes of the- - the closed session of March 2nd, 2002. The Attorney General should turn those matters over to Mr. Rothman.

Those are the basic reasons for my decision in this case.

United States Department of Education
Student Financial Assistance
Region II
75 Park Place
New York, NY 10007

October 14, 2003

Dr. Arnold Speert
President
William Paterson University
300 Pompton Rd.
Wayne, NJ 07470

Dear President Speert:

The purpose of this letter is to officially inform you that we have determined that William Paterson University has violated several provisions of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act as codified in Federal regulations at 34 CFR 668.46, and to advise you of the required corrective action. The violations relate to a complaint received in our office from Mr. David Rothman.

In a letter to you dated August 5, 2003 I asked you whether Mr. Rothman's allegation regarding the theft of funds intended for a scholarship fund in honor of his son had been reported to the campus police at William Paterson University. On August 14, 2003 I received a response from Cheryl Clarke, Deputy Attorney General of the State of New Jersey. In her letter, Ms. Clarke states "Mr. Rothman's representation to your office that he had filed a report with the campus police is inaccurate. Since no report was filed by Mr. Rothman, no action needed to be taken by campus police." However, information I have received subsequent

to my letter to you and the response from the Office of the Attorney General is at odds with that response. We have received a copy of an electronic mail message dated September 6, 2001 from Mr. Rothman where he reported the alleged crime to several individuals at William Paterson University, including Neil Lomonico who was then and is now a member of the campus police.

Section 668.46(f) of the Student Assistance General Provisions regulations requires an institution that maintains a campus police or campus security department to make a crime log for the most recent 60-day period available for public inspection during normal business hours. This log must record any crime that was reported to the campus police or campus security department. The regulations do not allow an institution to determine that it will not record the reported crime based upon the nature of the report (i.e. email, phone call, written report). It is our determination that William Paterson University violated regulations by not recording in the crime log the alleged larceny reported by Mr. Rothman on September 6, 2001. The log should have been updated with the report within two business days of the notification of this alleged crime to the campus police by Mr. Rothman.

In addition, we have received allegations that William Paterson University further violated the regulations when it did not allow representatives of the student newspaper access to the crime log. It has been reported to us that one of the institution's employees has stated that William Paterson University ceased making the crime log available for inspection because of problems it created for the institution.

As noted earlier, one purpose of this letter is to advise you of the required corrective action that William Paterson University must take in order to be in compliance with the

regulations in this area. First, the university must amend its crime log to record Mr. Rothman's report of the theft of funds from the scholarship fund. The entry must clearly be annotated to note that the recording in the crime log was made at a later date and was not contemporaneous with Mr. Rothman's September, 6, 2001 message. Second, the university must provide this office with copies of its revised procedures that will implement the requirement that the crime log be available to those who request access as specified in the regulation. Failure to comply can result in a $27,500 fine for each violation.

We would expect a response to this report within 30 days. Thank you for your attention to this matter.

Sincerely,
Robert McKiernan
Area Case Director

Cc:Cheryl R. Clarke
Mr. Rothman